

Locke Lord LLP
44 Montgomery Street, Suite 4100
San Francisco, CA 94104

1 LOCKE LORD LLP
2 Regina J. McClendon (SBN 184669)
3 rmcclelond@lockelord.com
4 Lindsey E. Kress (SBN 278213)
5 lkress@lockelord.com
4 44 Montgomery Street, Suite 4100
5 San Francisco, CA 94104
5 Telephone: (415) 318-8810
5 Fax: (415) 676-5816

7 Attorneys for Creditor
HomeVestors of America, Inc.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

13 In Re:) CASE NO.: 16-50361 MEH
14 LORI GREYMONT)
15 Debtor) Chapter 13
16)
17) MOTION FOR RELIEF FROM
18) AUTOMATIC STAY;
19) MEMORANDUM OF POINTS AND
20) AUTHORITIES IN SUPPORT
21)
22) Hearing Date: September 22, 2017
23) Hearing Time: 10:00 a.m.
24) Judge: Hon. M. Elaine Hammond
25)

HomeVestors of America, Inc. (“HomeVestors”), a creditor and party in interest in the above-captioned chapter 13 case, hereby moves the Court for entry of an order granting relief from

1 the automatic stay as to Lori Lee Greymont (the “Debtor”) to allow HomeVestors to terminate its
2 franchise agreement and related agreements with the Debtor. This motion is made on the grounds
3 that: (1) the Debtor has no equity in the franchise agreement (or the HomeVestors franchise) and it is
4 not necessary to her reorganization, and (2) cause exists to allow HomeVestors to terminate the
5 franchise agreement.

6 This Motion is based on the following Memorandum of Points and Authorities and the
7 declaration and exhibits attached thereto, and such other and further evidence as may be presented to
8 the Court in connection with this Motion and the hearing hereon, if any.

9 WHEREFORE, HomeVestors respectfully requests that this Court enter an order:

10 1. Granting HomeVestors relief from the stay to proceed under applicable
11 nonbankruptcy law to terminate its franchise and related agreements with the Debtor;

12 2. Waiving the 14-day stay prescribed by Rule 4001(a)(3) of the Federal Rules of
13 Bankruptcy Procedure; and

14 3. Granting such other and further relief as the Court deems just and proper.

15 Dated: August 25, 2017

Respectfully submitted,

16 LOCKE LORD LLP

17 By: /s/ Regina J. McClendon

18 Regina J. McClendon

19 Lindsey E. Kress

20 Attorneys for Creditor
21 HomeVestors of America, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

HomeVestors of America, Inc. (“*HomeVestors*”) files this *Memorandum of Points and Authorities* (this “*Memo*”) in support of its *Motion for Relief from the Automatic Stay* (the “*Motion*”), which requests entry of an order modifying the automatic stay so that HomeVestors may terminate a certain franchise agreement (as amended and including all attachments thereto, the “*Franchise Agreement*”), which for the avoidance of doubt includes as an attachment a certain web-based software and services agreement (the “*Services Agreement*” and together with the Franchise Agreement, the “*Agreement*”) with the debtor Lori Lee Greymont (the “*Debtor*”). In support of the Motion, HomeVestors submits the declaration of Bonnie M. DePasse (the “*Declaration*”) attached hereto as **Exhibit A** and incorporated herein by reference, and states as follows:

II. JURISDICTION AND VENUE

This Court has jurisdiction over the Motion by virtue of 11 U.S.C. § 362 and 28 U.S.C. § 1334. Venue is appropriate pursuant to 28 U.S.C. § 1334. This is a core matter pursuant to 28 U.S.C. § 157(b)(2)(G).

III. RELEVANT BACKGROUND FACTS

On February 5, 2016 (the “*Petition Date*”), the Debtor filed a voluntary chapter 13 petition commencing the above-captioned bankruptcy case. In her bankruptcy schedules of personal property, the Debtor listed, as an interest in an incorporated business, the following: “Summit Assets Group. Its assets include a franchise agreement with Homevestors [sic], which is a corporate asset but which was issued in the Debtor’s name per requirements of the franchise.” *See* Dkt. No. 1, at p. 13.¹ Also in the Debtor’s original schedules, she listed the same interest in Summit Assets Group and the alleged overlapping interest in the Agreement with HomeVestors as an exempt asset. *See id.* at p. 19. This exempt status would have arguably obviated the need for HomeVestors to seek stay relief to terminate the Agreement, but the Debtor later amended her Schedule C to omit any reference to the Agreement being part of an exempt estate asset. *See generally* Dkt. No. 22. The

¹ All references to docket entries refer to those filed in the above-captioned case (Case. No. 16-50361), unless otherwise noted.

1 Debtor has not, however, amended her schedules of personal property to omit reference to the
2 Agreement with HomeVestors. Moreover, the Debtor has failed to list HomeVestors as a creditor or
3 a notice party, despite owing unpaid franchise-related payments to HomeVestors under the terms of
4 the Agreement totaling \$29,700.87 as of July 19, 2017. *See* Ex. A. at ¶ 4; Ex. A.2. This entire
5 amount has accrued post-petition. *Id.*

6 Prior to the Petition Date, on or about December 24, 2013, HomeVestors and the Debtor
7 entered into the Agreement, attached hereto as **Exhibit A.1** and incorporated herein by reference.²
8 Among other things, the Agreement's terms and conditions authorized the Debtor, acting as
9 franchisee, to: (1) operate a HomeVestors business within a designated territory; (2) and use
10 HomeVestors's licensed trademarks and proprietary systems. *See* Ex. A.1 at p. 2. In exchange for
11 these rights, the Debtor agreed to pay HomeVestors certain fees in accordance with additional terms
12 and conditions. *See id.* at pp. 6–11. The Agreement further provides that failure to pay monies due
13 and owing to HomeVestors constitutes a material default, and that upon failure to cure after ten
14 days' notice of default HomeVestors possesses the right to terminate the Agreement at
15 HomeVestors's sole election. *Id.* at pp. 41–42. As set forth in the report of the Debtor's post-
16 petition open account activity, attached hereto as **Exhibit A.2** and incorporated herein by reference,
17 the unpaid balance that the Debtor owed to HomeVestors was \$29,700.87 as of July 19, 2017, and
18 that amount remains unpaid. *See* Ex. A. at ¶ 4; Ex. A.2.

19 Upon termination of the Agreement, the Debtor will no longer be entitled to identify herself
20 as a HomeVestors franchisee, must discontinue use of HomeVestors trade name, trademarks, and
21 other associated symbols, and must cause all listing agencies to remove listings associated with
22 Debtor's HomeVestors business, among other things. *See* Ex. A.1 at pp. 44–46. While termination
23 of the Agreement would normally require the Debtor to pay all outstanding amounts owed to
24 HomeVestors in addition to payment of liquidated damages, HomeVestors is not seeking stay relief
25
26

27 ² Although the Agreement has been subsequently modified and amended from time to time, such modifications and
28 amendments are not material to the relief requested in this Motion and Memo and therefore have not been included as
exhibits. All original attachments to the Agreement, including the Services Agreement, have been included in Exhibit
A.1.

1 at this time to seek the Debtor's compliance with those payment obligations. Instead, at this time,
2 HomeVestors is only seeking stay relief to terminate the Agreement with the Debtor.³

3 **IV. ARGUMENTS AND AUTHORITIES**

4 HomeVestors requests entry of an order modifying the automatic stay afforded under 11
5 U.S.C. § 362(a) with respect to the Debtor's interest in the Agreement so that HomeVestors may
6 terminate the Agreement. Stay relief is warranted here because (1) the Debtor has no equity in the
7 Agreement (or the HomeVestors franchise) and it is not necessary to her reorganization, and
8 (2) cause exists to allow HomeVestors to terminate the Agreement. HomeVestors is entitled to stay
9 relief to terminate the Agreement in accordance with its own terms, which allow for termination due
10 to the material default of non-payment of amounts owed. *See Ex. A.1* at pp. 41–42. “It is well
11 settled that ‘[t]he Bankruptcy Code neither enlarges the rights of a debtor under a contract, nor
12 prevents the termination of a contract by its own terms.’” *In re Carroll*, 903 F.2d 1266, 1271 (9th
13 Cir. 1990) (quoting *In re Advent Corp.*, 24 B.R. 612, 614 (Bankr. 1st Cir. 1982)). Here, consistent
14 with this statement in *Carroll*, HomeVestors seeks relief from the stay to terminate the Agreement
15 by its own terms. *See id.* In accordance with *Carroll*, and because HomeVestors satisfies 11 U.S.C.
16 § 362(d)(1) and (d)(2), it respectfully requests that its Motion be granted.

17 **A. Relief From Stay Should be Granted Because there is no Equity in the
18 Agreement and it is Not Necessary to the Debtor's Reorganization.**

19 Section 362(d)(2) of the Bankruptcy Code provides that the Court “shall grant relief from the
20 stay . . . , such as by terminating, annulling, modifying, or conditioning such stay with respect to a
21 stay of an act against property . . . , if the debtor does not have an equity in such property; and such
22 property is not necessary to an effective reorganization.” 11 U.S.C. § 362(d)(2).

23 Here, HomeVestors's request to terminate the automatic stay with respect to the Agreement
24 satisfies the standards of Section 362(d)(2). First, the Debtor has only a contractual interest in the
25 Agreement, and the Debtor's lack of any equity interest in the Agreement satisfies Section
26 362(d)(2)(A). To the extent the Debtor has an interest in the HomeVestors franchise, that interest is

27
28 ³ HomeVestors reserves all rights to seek further stay relief to enforce terms and conditions of the Agreement that are
effective upon termination. Again, for the avoidance of doubt, HomeVestors is seeking to terminate the Franchise
Agreement and all attachments thereto, which includes the Services Agreement.

similarly contractual in nature and is not one of equity—notwithstanding that the Debtor scheduled her interest in the Agreement in the section that usually applies to equitable interests. *See* Dkt. No. 1, at p. 13 (listing the Agreement as an alleged corporate asset of Summit Assets Group, which the Debtor claimed a 100% equity ownership interest in). Moreover, “[t]he concept of ‘equity’ in property is based on the premise that the property itself has some economic value to its owner.” *Scripps GSB I, LLC v. A Partners, LLC (In re A Partners, LLC)*, 344 B.R. 114, 121 (Bankr. E.D. Cal. 2006). By the Debtor’s own admission in her schedules, her interest in the Agreement is nominal only, as the economic value of the Agreement allegedly inures to the benefit of Summit Assets Group. *See* Dkt. No. 1, at p. 13.

Second, Section 362(d)(2)(B) is satisfied because the Agreement is not necessary to an effective reorganization because (1) it is not being assumed in the Debtor’s *Fourth Amended Chapter 13 Plan* (the “**Plan**”), (2) the Agreement’s remaining in effect, and the Debtor’s continued accrual of post-petition amounts owed thereunder, will actually inhibit the Debtor’s ability to reorganize, and (3) the Debtor is only incurring liabilities under the Agreement without it being used to generate any income. To the extent the Agreement is an executory contract, the Debtor’s Plan is not seeking to assume it. *See* Dkt. No. 88 at §§ 3.01–.02 (Debtor’s Plan listing no executory contracts that the Debtor will assume). That may be because the Debtor lacks the ability to cure the default of \$29,700.87 owed to HomeVestors. *See* 11 U.S.C. § 365(b) (requiring that defaults be cured before an executory contract may be assumed). And while the Debtor’s Plan provides that all executory contracts not listed in the Plan are rejected, *see* Dkt. No. 88 at §§ 3.01–.02, the Debtor did not list any executory contracts in her schedules as property of the estate, *see* Dkt. No. 1 at Sch. G (listing no executory contracts). Thus, if the Agreement is an executory contract, the Debtor’s failure to assume or reject it prior to confirmation means that her “obligations under it remain in effect and are unaltered by the plan.” *In re Reasor*, No. 13-12494, 2014 WL 1647142, at *4 (Bankr. D. Kan. Apr. 23, 2014). The result is the same if the Agreement is a non-executory contract, which is treated identical to unscheduled executory contracts—in either event, a debtor’s obligations “ride through” the bankruptcy and remain in place. *In re JZ L.L.C.*, 371 B.R. 412, 423–25 (B.A.P. 9th Cir. 2007).

Further, because the \$29,700.87 owed under the Agreement consists solely of post-petition debt, the Debtor will not be entitled to discharge this amount even if she performs all of her other obligations under the Plan. *See In re Reasor*, 2014 WL 1647142, at *4; *see also In re Perkins*, 304 B.R. 477, 485 (Bankr. N.D. Ala. 2004) (“[T]he discharge of post-petition debt is dependent on two factors: first, the post-petition claim must be allowed under § 1305, and second, the Chapter 13 plan must provide for the post-petition claim.”); *In re Trentham*, 145 B.R. 564, 569 (Bankr. E.D. Tenn. 1992) (recognizing four requirements for the discharge of post-petition consumer debt); *In re Thornton*, 21 B.R. 462, 464 (Bankr. W.D. Va. 1982).⁴ In the present situation, the likelihood of the Debtor continuing to incur non-dischargeable amounts owed under the Agreement actually interferes with an effective reorganization. *See In re Reasor*, 2014 WL 1647142, at *4. Here, similar to the situation in *Reasor*, the Debtor’s “non-treatment of the Agreement is not a bar to confirming her plan, though it may be an obstacle to her performing it.” *Id.*

Finally, the Debtor’s latest amended Schedules I & J reflect that she is not generating income from the Agreement or through the Summit Asset Group she controls with an alleged interest in the Agreement. *See* Dkt. No. 87 (reflecting income being derived only from another entity called SJREI and from family support payments). The Debtor reports monthly net income of \$429.00 and this amount is nearly dwarfed by the \$350 monthly payments due under the Agreement without taking into account the other associated Agreement-based costs and expenses that come due. *See* Ex. A.1 at p. 6 (requiring monthly fee payment of \$350).

In sum, the Agreement is not necessary to the Debtor’s reorganization because it is not featured in her Plan as a component of the reorganization, its obligations and enforceability will “ride through” the bankruptcy, the post-petition indebtedness will remain non-dischargeable, and it continuing to remain in effect will actual interfere with the Debtor’s ability to reorganize. For these reasons, Section 362(d)(2)(B) is satisfied with respect to the Agreement. HomeVestors should therefore be allowed to terminate the automatic stay because it satisfies the standards of 362(d)(2).

⁴ HomeVestors has not filed a claim under section 1305, and the Debtor lacks the ability to file such a claim on HomeVestors’s behalf. *See, e.g., In re Trentham*, 145 B.R. 564, 567 (Bankr. E.D. Tenn. 1992) (“[I]t is within the postpetition consumer creditor’s control whether a proof of claim is filed for the postpetition debt. The debtor has no standing under § 1305 or the Federal Rules of Bankruptcy Procedure to file a proof of claim on behalf of a postpetition consumer creditor.”).

1 **B. Cause Exists to Grant Relief From the Stay to Allow HomeVestors to Terminate**
2 **the Agreement.**

3 The “cause” requirement under section 362(d)(1) includes “the lack of adequate protection of
4 an interest in property of such party in interest.” 11 U.S.C. § 362(d)(1). Here, HomeVestors is not
5 adequately protected by the Debtor’s ongoing use of the Agreement as the Debtor has failed to make
6 any post-petition payments to HomeVestor’s under the Agreement despite continuing to use
7 HomeVestors’s trademarks and service marks and proprietary systems. Courts have found a lack of
8 adequate protection in precisely these circumstances when a debtor-franchisee fails to make
9 franchise payments or is otherwise unable to cure its defaults all while enjoying the benefits of an
10 agreement. *See, e.g., In re Deppe*, 110 B.R. 898, 906 (Bankr. D. Minn. 1990) (agreeing with
11 franchisor that “the existence of nonremedial grounds for termination, and the estate’s resultant
12 inability to assume the franchise agreements, give it “cause” for a grant of relief from stay pursuant
13 to 11 U.S.C. § 362(d)(1)’’); *In re B-K of Kan., Inc.*, 69 B.R. 812, 815 (Bankr. D. Kan. 1987) (finding
14 a lack of adequate protection because “[t]he debtors have continued to use the trademarks and
15 service marks without paying [the franchisor]’’).

16 Even if the Debtor is somehow able to cure the post-petition default of the outstanding
17 \$29,700.87 amount (which is incredibly unlikely), *see* Ex. A at ¶ 4; Ex. A.2, the Debtor must still be
18 able to establish that HomeVestors is adequately protected on a going forward basis, *see* 11 U.S.C.
19 § 361(1) (recognizing cash payment and periodic cash payments as forms of adequate protection).
20 Given the current state of the Debtor’s financial affairs, this will be impossible for her to do—she
21 cannot make her required Plan payments in addition to the \$350 monthly fee due under the
22 Agreement while only netting \$429 in income each month. *Compare* Dkt. No. 87 (disclosing \$429
23 in net income as of June 22, 2017) *with* Ex. A.1 at p. 6 (requiring monthly fee payment of \$350
24 under the Agreement).

25 Accordingly, HomeVestors is entitled to terminate the automatic stay to terminate the
26 Agreement pursuant to 11 U.S.C. § 362(d)(1) as well.

1 **C. The 14-Day Stay Under FED. R. BANKR. P. 4001(a)(3) Should be Waived.**

2 Under the Federal Rules of Bankruptcy Procedure, an order granting a motion for relief from
3 stay is stayed until the expiration of 14 days after the entry of the order, unless the court orders
4 otherwise. FED. R. BANKR. P. 4001(a)(3). Here, the 14-day stay prevents HomeVestor's from
5 terminating the agreement sooner, which in turn harms the Debtor as she continues to accrue post-
6 petition payment obligations under the terms and conditions of the Agreement that are not
7 dischargeable. *See* discussion in Part IV.A, *supra*. All the while, the Debtor continues to enjoy the
8 benefit of using trademarks and service marks and proprietary systems. *See* discussion in Part IV.B,
9 *supra*. Accordingly, HomeVestors respectfully requests that the Court waive the 14-day stay so that
10 HomeVestors may proceed with terminating the Agreement.

11 **V. RESERVATION OF RIGHTS**

12 HomeVestors reserves the right to seek additional relief from the automatic stay to enforce
13 terms and conditions of the Agreement, including all rights and remedies available to HomeVestors
14 under the Agreement, that are effective upon termination of the Agreement. HomeVestors further
15 reserves the right to oppose confirmation of the Debtor's Plan, to file a claim for post-petition
16 indebtedness that has accrued under the terms of the Agreement either under 11 U.S.C. § 1305 or as
17 a post-petition administrative expense, or to oppose the discharge of any debt owed by the Debtor to
18 HomeVestors.

19 **VI. CONCLUSION**

20 WHEREFORE, HomeVestors requests entry of an order modifying the automatic stay and
21 authorizing HomeVestors to terminate the Agreement, waiving the 14-day stay prescribed by Rule
22 4001(a)(3) of the Federal Rules of Bankruptcy Procedure, and for such other relief as the Court
23 deems just and proper under the circumstances.

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1 Dated: August 25, 2017

Respectfully submitted,

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LOCKE LORD LLP

By: /s/ Regina J. McClendon

Regina J. McClendon

Lindsey E. Kress

Attorneys for Creditor
HomeVestors of America, Inc.

CERTIFICATE OF SERVICE

The undersigned counsel for HomeVestors of America, Inc. certifies that on August 25, 2017, true and correct copies of the foregoing and the attached Relief from Stay Cover Sheet were forwarded to all parties receiving notice of electronic filing (NEF) in this case from the Court's electronic case filing (ECF) system, and by first class mail, postage prepaid, as indicated to the parties identified below and included on the attached service list.

/s/ Regina J. McClendon
Regina J. McClendon

Lori L. Greymont
1921 W. Edmundson Ave.
Morgan Hill CA 95037
Debtor

Henry G. Rendler
Law Offices of Henry G. Rendler
1550 The Alameda #308
San Jose CA 95126
Counsel for the Debtor

Devin Derham-Burk, Esq.
P.O. Box 50013
San Jose, CA 95150-0013
Chapter 13 Trustee

Locke Lord LLP
44 Montgomery Street, Suite 4100
San Francisco, CA 94104

Label Matrix for local noticing
0971-5
Case 16-50361
Northern District of California
San Jose
Thu Aug 24 09:33:39 PDT 2017

ALMG Enterprises, Inc.
c/o Julia M. Wei, Esq.
The Law Offices of Peter N. Brewer
2501 Park Blvd., 2nd Floor
Palo Alto, CA 94306-1925

Henry Chuang
Law Office of Peter N. Brewer
2501 Park Blvd. 2nd Fl.
Palo Alto, CA 94306-1925

(p) INTERNAL REVENUE SERVICE
CENTRALIZED INSOLVENCY OPERATIONS
PO BOX 7346
PHILADELPHIA PA 19101-7346

Nanette Dumas
P.O. Box 50013
San Jose, CA 95150-0013

Entrust Group, Inc., FBO R Lee
2362 County Line Rd.
Atlanta, GA 30331-6548

Lori Lee Greymont
1921 W. Edmundson Ave.
Morgan Hill, CA 95037-9630

HSBC
Mortgage Service Center
P.O. Box 5452
Mount Laurel, NJ 08054-5452

Internal Revenue Service
P O Box 7346
Philadelphia, PA 19101-7346

Nationstar Mortgage LLC
c/o Alridge Pite, LLP
4375 Jutland Drive, Suite 200
PO Box 17933
San Diego, CA 92177-7921

ALMG
3364 Kenzo Ct.
Mountain View, CA 94040-4328

CA Employment Development Dept.
Bankruptcy Group MIC 92E
P.O. Box 826880
Sacramento, CA 94280-0001

DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUS
c/o ALDRIDGE PITE, LLP
4375 Jutland Drive, Suite 200
P.O. Box 17933
San Diego, CA 92177-7921

Dept Of Ed/Navient
P.O. Box 9635
Wilkes Barre, PA 18773-9635

Employment Development Department
State of California
Bankruptcy Unit MIC: 92E
P.O. Box 826880
Sacramento, CA 94230-0001

FRANCHISE TAX BOARD
BANKRUPTCY SECTION MS A340
PO BOX 2952
SACRAMENTO, CA 95812-2952

Greymont Service Corp.
c/o Michael Hall Greymont
17950 Hillwood Lane
Morgan Hill, CA 95037-3529

HSBC
Mortgage Service Center
P.O. Box 830
Bowie, MD 20718-0830

Angie Marie Marth
Shapiro, Van Ess, Sherman & Marth, LLP
949 S Coast Dr. #475
Costa Mesa, CA 92626-7792

(p)NATIONSTAR MORTGAGE LLC
PO BOX 619096
DALLAS TX 75261-9096

ALMG Enterprises, Inc.
3364 Kenzo Ct.
Mountain View, CA 94040-4328

CA Franchise Tax Board
Attn: Special Procedures
P.O. Box 2952
Sacramento, CA 95812-2952

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRU
PO Box 619096
Dallas, TX 75261-9096

Devin Derham-Burk
P.O. Box 50013
San Jose, CA 95150-0013

Entrust FBO Scritzky
1078 Castleton Way
Sunnyvale, CA 94087-3707

Arnold L. Graff
Aldridge Pite, LLP
4375 Jutland Dr. #200
P.O.Box 17933
San Diego, CA 92177-7921

HSBC
Mortgage Service Center
P.O. Box 1945
Bowie, MD 20717-1945

HSBC
c/o Trustee Corps
TS CA 08001444-13-1
17100 Gillette Ave.
Irvine, CA 92614-5603

Michael Hall Greymont
17950 Hillwood Lane
Morgan Hill, CA 95037-3529

Nationstar Mortgage, LLC
c/o ALDRIDGE PITE, LLP
4375 Jutland Drive, Suite 200
P.O. Box 17933
San Diego, CA 92177-7921

Navient Solutions Inc.
Department of Education Loan Services
P.O. Box 9635
Wilkes-Barre, PA 18773-9635

Office of the U.S. Trustee / SJ
U.S. Federal Bldg.
280 S 1st St. #268
San Jose, CA 95113-3004

PHH Mortgage Corporation
ALDRIDGE PITE, LLP
4375 Jutland Drive, Suite 200
P.O. Box 17933
San Diego, CA 92177-7921

PHH Mortgage Corporation
One Mortgage Way
Mail Stop SV01
Mt Laurel NJ 08054-4637

Pensco FBO A. Scritzky
1078 Castleton Way
Sunnyvale, CA 94087-3707

Prop Management
205 Tucker Rd.
Scotts Valley, CA 95066

Henry G. Rendler
Law Offices of Henry G. Rendler
1550 The Alameda #308
San Jose, CA 95126-2304

STATE BOARD OF EQUALIZATION/SPECIAL OPS, MIC
PO BOX 942879
SACRAMENTO, CA 94279-0055

Santa Clara County Tax Collector
70 W. Hedding St.
County Government Center, East Wing
San Jose, CA 95110-1768

(p) CALIFORNIA STATE BOARD OF EQUALIZATION
ACCOUNT REFERENCE GROUP MIC 29
P O BOX 942879
SACRAMENTO CA 94279-0029

State of California
Franchise Tax Board
Bankruptcy Section MS A340
P.O. Box 2952
Sacramento, CA 95812-2952

Stuttgart, LLC
Attn.: Ann Stedler
3112 Windsor Rd.
Suite A114
Austin, TX 78703-2350

Trustee Corps
17100 Gillette Ave.
Irvine, CA 92614-5603

Trustee Corps
TS CA08001444-13-1
17100 Gillette Ave.
Irvine, CA 92614-5603

U.S. Attorney
Civil Division
450 Golden Gate Ave.
San Francisco, CA 94102-3661

Julia M. Wei
Law Offices of Peter N. Brewer
2501 Park Blvd. 2nd Fl.
Palo Alto, CA 94306-1925

The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g)(4).

Department of the Treasury
Internal Revenue Service
Centralized Insolvency Operations
P.O. Box 21126
Philadelphia, PA 19101-1734

Nationstar Mortgage LLC
PO Box 619096
Dallas, TX 75261-9741

State Board of Equalization
Attn: Special Procedures Section, MIC:55
P.O. Box 942879
Sacramento, CA 94279

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